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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT HAGOOD, III,
Petitioner,

v.

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; and PERSONNEL BOARD OF THE STATE OF ALABAMA,
Respondents.

Petition for a Writ of Certiorari to the Alabama Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether due process in employment termination is satisfied when an official actually hearing the evidence made credibility findings thereon which were rejected by an administrative body, based solely upon the contradicted statements of one witness, and where a state appellate court subsequently ruled that judicial review of this decision was not "concern[ed] . . . with the truthfulness of the testimony?"

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b) Petitioner represents that the parties to this petition are all named in the caption of this case. To the knowledge of the Petitioner, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

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REFERENCE TO REPORTS OF OPINIONS

The unpublished decision of the Alabama Supreme Court, denying the petition for Writ of Certiorari, was entered on April 18, 1997. (App. 1a). The final decision of the Alabama Court of Civil Appeals, presently unpublished, was entered by the Court on January 10, 1997. (App. 2a). In said decision, the Alabama Court of Civil Appeals withdrew its original decision, and as such, the July 12, 1996 opinion is not included in the appendix herein. The unpublished decision of the Circuit Court of Montgomery County, Alabama, was entered on December 21, 1995. (App. 6a). The unpublished administrative order of the applicable state agency, affirming the dismissal of Robert Hagood, was entered on October 11, 1994.

(App. 16a). And finally, the Recommended Order of the Hearing Officer, recommending reinstatement, was entered on April 9, 1994. (App. 18a).

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the Supreme Court of the State of Alabama being reviewed is dated April 18, 1997. (App. 1a.) The statutory provision conferring jurisdiction upon this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1257(a). In addition, Rule 10 of the Supreme Court Rules provides for review by this Court of decisions by a state court of issues of federal law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV; Section I

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of the law; nor deny any person within its jurisdiction the equal protection of the laws.

Alabama Code, Section 36-26-2(1)

> The following terms wherever used in this article shall have the meanings respectively ascribed to them in this section, unless the context plainly indicates a contrary meaning:
>
> (1) APPOINTING AUTHORITY. The officer, board, commission, person or group of persons having the power to make appointments to offices or positions of trust or employment in the state service.

Alabama Code Sec. 36-26-10. Exempt, unclassified, and classified service

(a) Positions in the service of the state shall be divided into the exempt, the unclassified and the classified service

(b) The exempt service shall include:

(1) Officers elected by the vote of the people.

(2) Officers and employees of the legislature.

(3) All employees of a district attorney's office.

(4) Members of boards and commissions, whether appointed or self-perpetuating, and heads of departments required by law to be appointed by the governor or by boards or commissions with the approval of the governor.

(5) All officers and employees of the state's institutions of higher learning, teacher-training institutions and normal schools, educational, eleemosynary and correctional institutions which are governed and controlled by boards of trustees or similar governing bodies and secondary agricultural schools and vocational schools.

(6) All inmate help in all charitable, penal and correctional institutions.

(7) All commissioned and warrant officers and enlisted men of the national guard and naval militia of the state in their respective military and naval grades.

(8) The governor's private secretary, legal advisor, recording secretary and those employees of the governor's office paid exclusively out of the governor's emergency or contingent funds.

(9) The employees of the state docks department engaged in railroad service and subject to the provisions of an act of congress known as the Railway Labor Act as amended or as it may hereafter be amended.

The services listed in this subsection as exempt shall in no respect be subject to the provisions of this article, anything to the contrary notwithstanding.

(c) The unclassified service shall include:

(1) One confidential assistant or secretary for each board, commission and elected officer and, when requested by the governor, for such department head appointed by the governor; and

(2) All employees of the governor's office not exempted. The positions in the unclassified service enumerated in this subsection may at the request of the appointing authority be filled by classified employees. Each of the employees thus appointed shall, at the conclusion of his occupancy of such position, resume his previous status in the classified service.

(d) The classified service shall include all other officers and positions in the state service.

(e) Except as to services denominated as exempt or unclassified services in subsections (b) and (c) of this section, the governor shall have the power by executive order to extend the provisions of this article to include additional positions or classes of positions.

(f) Employees in the unclassified service shall be subject to the same rules and regulations of employment as apply to employees in the classified service except as to appointment and dismissal.

Alabama Code, Section 36-26-27

(a) An appointing authority may dismiss a classified employee whenever he considers the good of the service will be served thereby, for reasons which shall be stated in writing, served on the affected employee and a copy furnished to the director, which action shall become a public record. The dismissed employee may, within 10 days after notice, appeal from the action of the appointing authority by filing with

the board and the appointing authority a written answer to the charges. The board shall, if demand is made in writing by the dismissed employee within 10 days after notice of discharge, order a public hearing and, if the charges are proved unwarranted, order the reinstatement of the employee under such conditions as the board may determine. Upon a majority vote of the board, the board may impose a punishment other than termination including but not limited to a reinstatement with forfeiture of back wages and benefits between the date of termination and the date of the board's order reinstating the employee, or a suspension up to and including 30 days.

(b) In addition to removal by and appointing authority, persons in the classified service may be removed or disciplined in the manner described in this subsection. Charges may be filed by any officer, citizen or taxpayer of the state with the director who shall, within five days, cause a copy to be served upon the person complained against and shall set a day not less than 10 not more than 20 days after such charges. This hearing may be before the director, a special agent appointed for the purpose by the director or the board itself. If before the director or a special agent, the director or special agent shall take testimony offered in support and denial of such charges and from the same submit to the board, within five days, a finding of facts and law involved and a recommended decision. The board at its next regular or special meeting shall consider said report and modify, alter, set aside or affirm said report and certify its findings to the appointing authority who shall forthwith put the same into effect. If the board hears said charges directly or requires the transcribing and submission of the testimony taken before the director or special agent, it shall make up and file its own findings and decision. The decision of the board based upon its records and the testimony shall be final.

(c) In proceeding under this section it shall be no defense or excuse for a forbidden act or for an omis-

sion to observe the laws or rules that such act or omission was directed by a superior, unless a written direction or order from such superior to that effect is proved. If any employee in the state service shall willfully refuse or fail to appear before any court or judge, any legislative committee or any officer, board or body authorized to conduct any hearing or inquiry or, having appeared, shall refuse to waive immunity from prosecution on account of any matter about which he may be asked to testify at any such hearing or inquiry, such conduct shall be cause for removal.

Alabama Code, Section 41-22-20

(a) A person who has exhausted all administrative remedies available within the agency, other than rehearing, and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) All proceedings for review may be instituted by filing of notice of appeal or review and a cost bond with the agency to cover the reasonable costs of preparing the transcript of the proceeding under review, unless waived by the agency or the court on a showing of substantial hardship. A petition shall be filed either in the circuit court of Montgomery county or in the circuit court of the county in which the agency maintains its headquarters, or unless otherwise specifically provided by statute, in the circuit court of the county where a party other than an intervenor, resides or if a party, other than an intervenor, is a corporation, domestic or foreign, having a registered office or business office in this state, then in the county of the registered office or principal place of business within this state.

(c) The filing of the notice of appeal or the petition does not itself stay enforcement of the agency deci-

sion. If the agency decision has the effect of suspending or revoking a license, a stay or supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the reviewing court, upon petition of the agency, determines that a stay or supersedeas would constitute a probable danger to the public health, safety, or welfare. In all other cases, the agency may grant, or the reviewing court may order, a stay upon appropriate terms, but, in any event, the order shall specify the conditions upon which the stay or supersedeas is granted; provided, however, if the appeal or proceedings for review to any court is from an order of the agency increasing or reducing or refusing to increase rates, fares, or charges, or any of them, or any schedule or parts of any schedule or rates, fares, or charges, the reviewing court shall not direct or order a supersedeas or stay of the action or order to be reviewed without requiring, as a condition precedent to the granting of such supersedeas, that the party applying for supersedeas or stay shall execute and file with the clerk of the court a bond as provided for and required by statute or law. If the circuit court shall fail or refuses to grant supersedeas or stay, the party seeking such relief may petition the appropriate court to which the appeal or review lies to order a supersedeas or stay of the action or order of the agency from which review is sought. After the required bond shall have been filed and approved by the clerk, such agency order shall be stayed and superseded, and it shall be lawful to charge the rates, fares, or charges which have been reduced, refused, or denied by the agency order, until the final disposition of the cause. The provisions of this subsection shall apply when applicable, anything in Rule 60 of the Alabama Rules of Civil Procedure restricting the provisions of this subsection to the contrary notwithstanding.

(d) The notice of appeal or review shall be field within 30 days after the receipt of the notice of or other service of the final decision of the agency upon

the petitioner or, if a rehearing is requested under Section 41-22-17, within 30 days after the receipt of the notice of or other service of the decision of the agency thereon. The petition for judicial review in the circuit court shall be filed within 30 days after the filing of the notice of appeal or review. Copies of the petition shall be served upon the agency and all parties of record. Any person aggrieved who is not a party may petition to become a party by filing a motion to intervene as provided in Section 41-22-14. Failure to file such petition within the time stated shall operate as a waiver of the right of such person to review under this chapter, except that for good cause shown, the judge of the reviewing court may extend the time for filing, not to exceed an additional 30 days, or, within four months after the issuance of the agency order, issue an order permitting a review of the agency decision under this chapter notwithstanding such waiver. Any notice required herein which is mailed by the petitioner, certified mail return receipt requested, shall be deemed to have been filed as of the date it is postmarked. This section shall apply to judicial review from the final order or action of all agencies, and amends the judicial review statutes relating to all agencies to provide a period of 30 days within which to appeal or to institute judicial review.

(e) If there has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts, the court shall order the agency to conduct a prompt fact-finding proceeding under this chapter after having a reasonable opportunity to reconsider its determination on the record of the proceedings.

(f) Unreasonable delay on the part of an agency in reaching a final decision shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency.

(g) Within 30 days after receipt of the notice of appeal or within such additional time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record and transcript of the proceedings under review. With the permission of the court, the record of the proceedings under review may be shortened by stipulation of all parties to the review proceedings. Any party found by the reviewing court to have unreasonably refused to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(h) The petition for review shall name the agency as respondent and shall contain a concise statement of:

(1) The nature of the agency action which is the subject of the petition;

(2) The particular agency action appealed from;

(3) The facts and law on which jurisdiction and venue are based;

(4) The grounds on which relief is sought; and

(5) The relief sought.

(i) In proceedings for judicial review of agency action in a contested case, except where appeal or judicial review is by a trial de novo, a reviewing court shall not itself hear or accept any further evidence with respect to those issues of fact whose determination was entrusted by law to the agency in that contested case proceeding; provided, however, that evidence may be introduced in the reviewing court as to fraud or misconduct of some person engaged in the administration of the agency or procedural irregularities before the agency not shown in the record and the affecting order, ruling, or award from which re-

view is sought, and proof thereon may be taken in the reviewing court. If, before the date set for hearing a petition for judicial review of agency action in a contested case, it is shown to the satisfaction of the court that additional evidence is material and that there were good reasons for failure to present it in the contested case proceeding before the agency, the court may remand to the agency and order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision in the case by reason of the additional evidence and shall file that evidence and any modification, new findings, or decision with the reviewing court and mail copies of the new findings, or decision to all parties.

(j) The review shall be conducted by the court without a jury and, except as herein provided, shall in the review of contested cases be confined to the record and the additions thereto as may be made under subsection (i) of this section. Judicial review shall be by trial de novo in the circuit court where review is sought from tax assessments, tax determinations or tax redeterminations, rulings of the revenue department granting, denying, or revoking licenses, or rulings on petitions for tax refunds, or, unless a subsequent agency statute provides otherwise, where an agency statute existing on the effective date of Act No. 81-855, 1981 Acts of Alabama, or thereafter enacted provides for a trial de novo on appeal to or review by the courts; provided, however, in the review of tax assessments, tax determinations, or tax redeterminations, rulings of the revenue department granting, denying, or revoking licenses, or rulings on petitions for tax refunds, the administrative record and transcript shall be transmitted to the reviewing court as provided in subsection (g) of this section, and, on motion of either party, shall be admitted into evidence in the trial de novo, subject to the rights of either party to assign errors, objections, or motions to exclude calling attention to any testimony or evi-

dence in the administrative record or transcript which is deemed objectionable or inadmissible. Provided further that, with the consent of all parties, judicial review may be on the administrative record and transcript. The court, upon request, shall hear oral argument and receive written briefs.

(k) Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. The court may affirm the agency action or remand the case to the agency for taking additional testimony and evidence or for further proceedings. The court may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) In violation of any pertinent agency rule;

(4) Made upon unlawful procedure;

(5) Affected by other error of law;

(6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretition or a clearly unwarranted exercise of discretion.

(*l*) Unless the court affirms the decision of the agency, the court shall set out in writing, which writ-

ing shall become a part of the record, the reasons for its decision.

STATEMENT OF THE CASE [1]

A. Course of the Proceedings and Dispositions in the Court Below

Robert Hagood ("Hagood"), the Petitioner in the instant proceeding, was an employee of the State of Alabama, serving for approximately two and one-half years as a Pollution Control Specialist for Respondent, the Alabama Department of Environmental Management ("ADEM"). This case arises out of the October 15, 1993 termination of Hagood from this merit system position.

Pursuant to applicable state administrative law, § 36-26-27, *Alabama Code* (1966 Cum. Supp.), Hagood filed a timely challenge of his dismissal to the Alabama State Personnel Board ("Board"). (C. 5). The Board appointed E. J. "Mac" McArthur ("McArthur"), then serving as District Attorney of Macon County and subsequently named to head the Alabama Ethics Commission, (C. 45) as Hearing Officer to conduct an evidentiary hearing regarding Hagood's dismissal. (C. 232-659).

On March 18, 1994, McArthur conducted an extensive hearing at which all affected parties were given a full and fair opportunity to present demonstrative evidence, verbal testimony, and oral argument. *Id.* To this date, the Hearing Officer is the only person who has heard any evidence *ore tenus*. Following the hearing, in a lengthy opinion weighing all the evidence and comparing the credibility and demeanor of witnesses, McArthur concluded that "there was a lack of evidence to show that 'Robert B.

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[1] The assertions contained in the Statement of the Case are drawn, almost entirely, from the final order of the Circuit Court of Montgomery County, Alabama. Where included, references to the record will be preceded by the letter "C". There is no reporter's transcript, and the clerk has inserted the administrative record in sequential numbers with the clerk's record.

Hagood was deficient in his job performance to any significant degree . . .' and recommended to the Board 'that Robert B. Hagood's dismissal be overturned and that he be reemployed with back pay.' " (C. 5-12).[2]

ADEM filed exceptions to McArthur's Report. (C. 58-87). On August 16, 1994, the Board convened to consider these exceptions. (C. 678-87). At that time, the Board heard oral argument from counsel, and during that meeting and the following two meetings of the Board, considered the briefs of the parties; however, at no time did the members of the Board hear evidence *ore tenus*.

Following three regular monthly meetings of the Board, a final agency determination was reached. (C. 13-4). In its final order of October 11, 1994, the Board gave only the following reason for rejecting the findings and recommendation of the hearing officer:

> ". . . [T]he Hearing officer reports the testimony of Hagood's supervisor of counseling on a number of occasions for Hagood's lack of understanding of the pollution regulations, and Hagood's lack of ability to apply those in the field, Hagood's poor communication skills and regulatory presence, and the further warnings to the employee through the performance evaluation process. *The Board concludes, as a matter of law, that this testimony is sufficient evidence to support the termination charge* and thus the Hearing Officer's findings and recommendations should be rejected."

Id. (Emphasis added.) There is no other statement or enunciation anywhere in the record by the Board to justify, explain, or rationalize why it rejected the hearing officer's report, nor does the Board, anywhere in its determination, address the evidence submitted by Hagood or the credibility or demeanor determinations made by McArthur.

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[2] Additional copies of this hearing report are also in the clerk's record, beginning at pages 81 and 669. For the sake of clarity and convenience, any reference to this report will be cited to the first copy thereof, appearing in the record on pages 5 through 12.

Pursuant to the Section 20 of the Alabama Administrative Procedure Act, *Alabama Code* § 41-22-20 (1996 Cum. Supp.), Hagood filed a timely notice of appeal, cost bond, and petition for judicial review with the Fifteenth Judicial Circuit of the State of Alabama. (C. 1-4, 16-7). Following oral argument, but again without opportunity to receive evidence *ore tenus,* Circuit Judge Randall Thomas issued a final order in the case. Judge Thomas' order reversed the Board and directed ADEM and the Board to reinstate Hagood, with back pay, to his position as a Pollution Control Specialist for ADEM. *Id.,* see also (C. 769).

On January 3, 1996, ADEM appealed the ruling of Judge Thomas, to the Alabama Court of Civil Appeals. On July 12, 1996, the Court, acknowledging that the evidence was in dispute, the Court held that "[o]ur concern is not with the *truthfulness* of the testimony" offered to substantiate termination, reversed the Circuit Court. *Alabama Department of Environmental Management v. Hagood,* slip op. no. 295048, January 10, 1997 (Ala. Civ. App.) Subsequently, Hagood filed an Application for Rehearing which was denied on January 10, 1997.

Hagood then filed a timely Petition for Writ of Certiorari with the Alabama Supreme Court. Said petition was denied on April 18, 1997. The instant petition was then prepared and timely filed.

B. Stage and Manner in which federal questions were raised and the disposition thereof

The underlying federal question, whether due process mandates a meaningful post-termination hearing in which a discharged employee may present evidence to a fact finder, was first raised in the Circuit Court of Montgomery County, Alabama. In the initial Petition for Judicial Review, Hagood averred "that the rejection of the hearing officer's recommendation without adequate reasons for doing so . . . [was] made upon unlawful procedure." The

trial court did not reach this issue. Rather, it found that the Board's actions were "unreasonable, arbitrary, and capricious" and therefore violative of the Alabama Code.

This issue was further crystallized in briefs to the state appellate courts, in which Hagood stated that due process requires that "the one who decides must hear" and it is not appropriate for one who was not privy to the evidence to decide a case, citing *Morgan v. U.S.*, 298 U.S. 468 (1931). The Alabama Court of Civil Appeals rejected Hagood's contention and held that the hearing officer's report carries no prosumption of correctness and may be overcome by the agency's "substantial" evidence.[3]

C. Statement of the Facts

Hagood was hired by Dave Davis on March 23, 1991, as a Pollution Control Specialist working in the Resource Conservation Recovery Act Compliance Branch of Alabama Department of Environmental Management's ("ADEM") Land Division. (R. 251) At the time that Hagood was interviewed for the position, Davis had only recently been made a supervisor and Chief of the North Unit of the Resource Conservation Recovery Act Compliance Branch and had never hired or trained any other employee. (R. 335)

Hagood was dismissed from his position as a pollution control specialist at ADEM effective on October 15, 1993. The agency cited, in the dismissal letter sent to the Appellee, poor work performances and a failure to meet the standards established for his job classification over the previous two years. (C. 93). Hagood then appealed his dismissal to the State Personnel Board ("Board") under the authority of *Ala. Code* § 36-26-27, (1975). The Board appointed E. J. "Mac" McArthur as a hearing offi-

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[3] Hagood has argued below that ADEM's evidence was not "substantial" in accordance with state law; however, such issue is not available for review by this Court.

cer to conduct an evidentiary hearing to report his findings of fact, conclusions of law, and a recommended action.

McArthur conducted an extensive evidentiary hearing on March 18, 1994 in which numerous documents were submitted and testimony of twelve witnesses taken. Throughout the course of the proceedings in this case, only McArthur was able to listen to this testimony while observing the demeanor of the witness in order to make a determination of credibility. Folowing this hearing, McArthur weighed the credibility of conflicting evidence and concluded "there was a lack of evidence to show that Robert B. Hagood was deficient in his job performance to any significant degree," and recommended to the Board "that Robert B. Hagood's dismissal be overturned and he be reemployed . . . with back pay." (C. 5-12).

McArthur, in entering his Report and Recommended Order, made extensive factual findings. These findings are set out in full in the appendix attached hereto, at pages 18a-24a. These findings included:

> [N]othing in this hearing indicated to this Hearing Officer that at any time during Hagood's employment at ADEM his standard of conduct failed to be satisfactory. It would seem to this Hearing Officer that [ADEM's claim to the contrary] is an inconsistent and some what arbitrary element of this employee's job appraisal. . . .
>
> During Hagood's tenture at ADEM, his trips to the field to apply the knowledge of the regulations became more and more infrequent. Further, it seemed evident from the testimony at this hearing that Bob Hagood's error and omissions in the field were not corrected [by his supervisors] at that time but were later reported and used to show why Hagood was not performing his job. When Bob Hagood testified, he indicated that at first he did not catch on to the regulations; however, he indicated that he spent the time in which he was kept at the ADEM office to thor-

oughly learn the regulations. Numerous witnesses as called on behalf of Bob Hagood further verified this fact. They stated in their opinion, that Bob had a better understanding of the regulations at the time of his termination than did most any other field inspector. . . .

At one point in time Davis referred to Hagood's writing as that of a fifth grade level. However, it should be noted, that when this Hearing Officer reviewed some of the problems which Davis had with Hagood's written communications, they appeared to be only differences in style and not that of content or correct grammar. . . .

Although Davis testified that he did not feel that Hagood took his job seriously, showed improper field demeanor and poor judgment, *it is entirely appropriate to note the demeanor of these two men at this hearing. Clearly, Mr. Davis and his supervisor, Steve Jenkins, are much more formal than Bob Hagood is. Further, at this hearing, this Hearing Officer observed that Bob Hagood was much more open and relaxed than Davis and Jenkins.* . . .

Davis testified that Hagood was so for [sic] behind in his work at the office that he was not allowed to go out in the field. This testimony does not seem consistence [sic] with testimony from the other witnesses who indicated that Hagood was relegated to a desk and given no job duties. Further, there was ample testimony that others were given more opportunities to go into the field than Bob Hagood was. . . .

Further, there were some disagreements as to the exercise of professional judgment or to the interpretation or regulations; however, it appeared from Hagood's testimony that he had a better grasp on these regulations than did his supervisor. . . .

In conclusion, this case may well revolve around a difference of personalities rather than a deficiency in job performance. Arguable [sic] Robert Hagood did not catch on to field inspections nor did he under-

> stand the regulations as quickly as others did; however, it appears clear that at some point during Hagood's first year at ADEM, his supervisors lost all confidence in his capabilities and his abilities to improve. Based on this, they took many of Hagood's opportunities to learn and to show competence in field investigations away from him. Further, they, in large part, relegated him to a desk. Rather than accept these lack of duties, Bob Hagood developed a proficiency in understanding the regulations at ADEM. Further, as to the errors in Hagood's correspondence as cited by Davis, the changes were mostly editorial in nature. . . .

(Emphasis added.)

These findings of the Hearing Officer were submitted to the Board. Based on the argument of counsel and its review of the administrative record, but without the benefit of testimonial evidence, the Board rejected McArthur's findings and upheld Hagood's termination. As grounds for this finding, the Board concluded that, "as a matter of law" the testimony of an immediate supervisor, supporting termination, was, in and of itself, sufficient to uphold the discharge decision.

REASONS FOR GRANTING THE PETITION

AN EMPLOYEE WITH A PROPERTY INTEREST IN CONTINUED EMPLOYMENT, THREATENED WITH LOSS OF THAT JOB, IS ENTITLED TO A MEANINGFUL POST-TERMINATION HEARING. ROBERT HAGOOD WAS DENIED THIS ESSENTIAL CONSTITUTIONAL RIGHT.

The Fourteenth Amendment to the United States Constitution provides in pertinent part, that "no state shall . . . deprive any person of life, liberty or property without due process of law. . . ." Absent a protected property interest, an employee has no vested interest in any procedural avenue for post termination relief. *Board of Regents v. Roth,* 408 U.S. 564 (1972); see also *Wood v.*

University of So. Mississippi, 539 F.2d 529 (5th Cir. (Ms) 1976); *Bunger v. University of Oklahoma Bd. of Regents*, 95 F.3d 987 (10th Cir. (Ok) 1996); *De Tore v. Jersey City Public Employees Union*, 615 F.2d 980 (3rd Cir. (NJ) 1980); *White v. Thomas*, 660 F.2d 680 (5th Cir. (Tx) 1981).

A property right in continued employment may be created by contract, *Gorman v. Robinson*, 977 F.2d 350 (7th Cir. (Il) 1992); *Wooten v. Clifton Forge School Bd.*, 655 F.2d 552 (4th Cir. (Va) 1981); *Russell v. Harrison*, 736 F.2d 283 (5th Cir. (Ms) 1984); *Stein v. Board of New York, Bureau of Pupil Transp.*, 792 F.2d 13 (2nd Cir. (NY) 1986); *Cummings v. South Portland Housing Auth.*, 985 F.2d 1 (1st Cir. (Me) 1993), custom and practice, *Blakenbaker v. McCook Public Power Dist.*, 940 F.2d 384 (8th Cir. (Ne) (1991); *McLaurin v. Fischer*, 768 F.2d 98 (6th Cir. (Oh) 1985) (Tradition of "permanent" status), or state law. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985).

In the instant case, Hagood claims a protected property interest through the application of Alabama law. Section 36-26-27(a) of the Alabama Code provides that the appointing authority[4] may dismiss classified employee[5] only for "the good of the service." *Ala. Code* (1991 Repl. Vol. § 36-26-27(a)). The former Fifth Circuit, in interpreting this core section, held that Alabama law creates a property right for such state merit system employees. *Thompson v. Bass*, 616 F.2d 1259 (5th Cir. (Al) 1980). The same rule of law continues to apply today in the new

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[4] Section 36-26-2(1) defines an appointing authority as "[t]he officer, board, commission, person or group of persons having the power to make appointments to . . . employment in the state service." *Ala. Code* (1991 Repl. Vol.) § 36-26-2(1). In the instant matter, it is undisputed that, at all times relevant herein Mr. Leigh Peagues, then Director of ADEM, was an "appointing authority" within the meaning of this statute.

[5] Hagood is, pursuant to Section 36-26-10(c), such a "classified employee."

Eleventh Circuit. *Best v. Boswell,* 696 F.2d 1282 (11th Cir. (Al) 1983); see also *Whitfield v. Finn,* 731 F.2d 1506 (11th Cir. (Al) 1984).

This Honorable Court has defined due process in *In re Gault,* 387 U.S. 1 (1967). In *Gault,* Justice Fortas, writing for the Court stated:

> Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. As Mr. Justice Frankfurter has said: "The history of American freedom is, in no small measure, the history of procedure." But in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. "Procedure is to law what 'scientific method' is to science."

Id. at 20-1 (Footnotes omitted.)

The type of procedural due process required in any given situation depends on numbers factors, including, "(1) the private interests at state; (2) the risk that the procedures used will lead to erroneous results and the probable value of the suggested procedural safeguard; (3) and the governmental interests affected." *Little v. Streeter,* 452 U.S. 1 (1981). However, while the requirements for a hearing may vary from case to case based on circumstances, whatever hearing is accorded must not be a mere pretextual sham designed to conceal the wrongful deprivation of a constitutional right. Such a hearing must be meaningful and appropriate to the nature of the particular situation. *Bell v. Burson,* 402 U.S. 535 (1971). "What the Fourteenth Amendment does require, however, 'is "an *opportunity* . . . granted at a meaningful time and in a

meaningful manner.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (Quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 [1965]) (Emphasis added by *Logan* Court.)

In employment termination cases, due process likewise must include a meaningful opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill, supra; Green v. McElroy*, 360 U.S. 475 (1959); see also *Carter v. Western Reserve Psychiatric Habilitation Center*, 767 F.2d 270 (6th Cir. (Oh) 1985); *Wallace v. Shreve Mem. Library*, 97 F.3d 746 (1996); *Richardson v. Felix*, 856 F.2d 505 (3rd Cir. (VI) 1988); *Brown v. Georgia Dept. of Revenue*, 881 F.2d 1018 (11th Cir. (Ga) 1989); *Blankenbaker v. McCook Public Power Dist.*, 940 F.2d 384 (8th Cir. (Ne) 1991); *Helton v. Clements*, 832 F.2d 332 (5th Cir. (Tx) 1987); *Dwyer v. Regan*, 777 F.2d 825 (2nd Cir. (NY) 1985).

It is a long-standing and fundamental tenet of the law that "the one who decides must hear." *Morgan v. United States*, 298 U.S. 468, 481, 80 L.Ed. 1288, 56 S. Ct. 906 (1931). Historically, the Alabama Courts have followed this basic maxim. The Alabama Supreme Court first addressed the question of the deference accorded to an agency (as opposed to a hearing officer) in *Alabama Public Service Commission v. Perkins*, 275 Ala. 1, 151 So. 2d 627 (1962). In affirming the Circuit Court's reversal of a commission ruling on an application regarding a motor carrier's operating rights, that Court stated:

> In the case before us, as we have shown, there was no hearing of evidence by the commission or its members. The evidence was heard *ore tenus* by the attorney-examiner duly appointed by it to conduct the hearing. From the evidence itself and the demeanor of the witnesses, he made findings and drew conclusions which he reported in writing to the commission. While it was the privilege of the commission to reach their own conclusions from the record before them, just as it is the privilege of the court to reach conclu-

> sions contrary to those of the commission, yet, as we have said in reviewing the judgment of the circuit court, the commission was in no better position than the circuit court or this court. Since the attorney-examiner alone saw and heard the witnesses and observed their demeanor on the stand, it would be illogical and unwarranted on the part of both the circuit court and this court not to indulge some favorable presumption in considering the attorney-examiner's report as a part of the whole record. Especially is this true when the findings and conclusions find support in the evidence.
>
> . . .
>
> We have not placed the burden of final decision upon the attorney-examiner; this, as it should, rests upon the members of the Commission. But when as here, the members of the Commission did not personally conduct the hearing and had not otherwise observed the demeanor of the witnesses, the evidence being conflicting, the findings of the attorney-examiner on factual issues should be accorded the usual presumptions. This is a basic theory upon which all appellate tribunals and decision-making bodies not observing the witnesses must operate, having only the benefit of the cold record before them.

Id. at 6-7. Subsequent cases followed the maxim of "the one who decides must hear." See e.g. *Alabama Public Service Commission v. Chem-Haulers, Inc.*, 293 Ala. 677, 309 So. 2d 453 (1975); *Harbin v. Alabama Public Service Commission*, 474 So. 2d 63 (Ala. 1985) ("Where the evidence was presented *ore tenus* and was heard by a hearing examiner and not by the commission members themselves, the presumption of correctness normally accorded to the commission's order will be accorded to the hearing examiner's findings of fact.").

With the advent and recent expansion in use of Administrative Law Judge ("ALJ") or Hearing Officers, this stricture has been rempered by the lawyers and inter-

mediate federal courts. For example, it has been held that an administrative agency is not bound by an ALJ's inferences drawn from evidence presented. *See Drexel Burnham Lamber, Inc. v. Commodity Futures Trading Com'n,* 850 F.2d 742 (D.C. Cir. 1988). Additionally, it has been held that a hearing officer's determinations on matters of law or policy are, ordinarily, reviewed by an agency *de novo. See Iran Air v. Kugelman,* 996 F.2d 1253 (D.C. Cir. 1993). However, courts have held that the factual findings of the only quasi-judicial officer hearing the evidence are still entitled to a degree of deference. *See Magallanes v. Bowen,* 881 F.2d 747 (9th Cir. (Ca) (1989); *Parker for Lamon v. Sullivan,* 891 F.2d 185 (7th Cir. (Il) 1989). In *Magallanes,* a case regarding disability benefits for a social security claimant, the Court held that the "ALJ is responsible for determining credibility and resolving conflicts in [the] testimony. The ALJ is likewise responsible for resolving ambiguities." *Magallanes,* at 750 (Citation omitted.)

In this case, the Alabama Courts have departed from this longstanding and fundamental principle of due process. Here, the Hearing Officer conducted an extensive hearing at which all interested parties were able to present documentary evidence and oral testimony. Following the hearing, the Hearing Officer entered a lengthy proposed order in which he assessed the credibility, demeanor, and veracity of the witness, as well as the weight of the evidence. On the heals of this exhaustive proposed order, the Board, without hearing *any* evidence, rejected the findings and conclusions of the Hearing Officer.

The Board held that "as a matter of law . . . [the testimony of the Supervisor] is sufficient evidence to support the termination charge." It is respectfully submitted that in a myriad of employee discharge cases, there would never be a single one in which the official requesting discharge has not been willing to testify that the employee had several serious and substantial shortcomings. While Mc-

Arthur, the only quasi-judicial officer who ever heard any evidence, questioned the credibility of the Supervisor's testimony, the Alabama Court of Civil Appeals held that "[o]ur concern is not with the *truthfulness* of the testimony." (Emphasis added.)

The net effect of the Court of Civil Appeals' holding is the emasculating of a terminated merit system employee's fundamental avenue for relief—a hearing before a neutral adjudicator, at which time he or she has a meaningful opportunity to present evidence to refute the charges against them. If a termination will be affirmed, "as a matter of law," every time the supervisor testifies that such termination is in the best interest of the service, and the reviewing courts are instructed that "[o]ur concern is not with the truthfulness of the testimony," all employee terminations will be affirmed. Under the rationale of the Alabama Court of Civil Appeals, the terminated employee may only present evidence to an advisor whose opinion on the credibility of a witness may be rejected without any basis in fact. Further, without hearing one shred of testimony, the decision of the agency becomes cloaked in a shroud of "correctness" which *must* be affirmed by the courts if there is "evidence to support the Board's order. . . ." *Alabama Department of Environmental Management* v. *Hagood,* slip op. No. 295048, January 10, 1997 (Ala. Civ. App.) (Citations omitted.)

CONCLUSION

Fundamental principles of due process mandate that a terminated employee with a protected property interest in continued employment is entitled, at a minimum, to a post-termination hearing at which his evidence is weighted and considered by a finder of facts. The procedure approved of herein denies Hagood this right.

For the foregoing reasons, Petitioner Robert Hagood respectfully requests that this Court will grant his Petition for Writ of Certiorari, and, upon the merits of the case, order his reinstatement to his proper position.

Respectfully submitted,

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